

1420568 (Migration) [2015] AATA 3597 (9 November 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Doushita Woodun

CASE NUMBER: 1420568

DIBP REFERENCE(S): CLF2013/153668

MEMBER: Margie Bourke

DATE: 9 November 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- r.2.03A

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Statement made on 09 November 2015 at 3:59pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 27 November 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 5 July 2013 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the applicant met the requirements for de facto relationship.
4. The Tribunal has considered the matters in the Department's decision record dated 27 November 2014, and the information provided by the applicant in support of the application for the visa. After considering the information before it, the Tribunal decided based on the material available to it and pursuant to s.360(2) of the Act, to make a decision favourable to the applicant without inviting the applicant to appear before it.
5. The following are the reasons that the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issues in the present case are whether the applicant and sponsor are in a de facto relationship within the meaning of s.5CB(2), and, if so, whether the relationship meets the requirements of r.2.03A, in particular whether the relationship had been in existence for 12 months at the time of application. The Tribunal notes that in the Department's decision record dated 27 November 2014 the main issue for the delegate was that there was not enough evidence that the relationship had existed for 12 months prior to application.

SPOUSE/DE FACTO (cl.820.211(2)(a))

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clause 820.211(2)(a) requires that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the sponsor's Victorian birth certificate the Tribunal is satisfied the sponsor is an Australian citizen by birth. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
8. The Tribunal has considered the certificate of Islamic marriage dated 27 November 2011, and is satisfied the parties participated in an Islamic marriage ceremony on that date. The Tribunal accepts the certificate is not valid for the purposes of the Marriage Act Commonwealth 1961. The Tribunal has considered the registered marriage certificate dated 22 August 2013. The Tribunal is satisfied, based on the certificates provided by the applicant, that the parties were not validly married at the time of application, but were

subsequently validly married for the purposes of the Act. The Tribunal has therefore considered whether the parties were in a de facto relationship at the time of application.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

9. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
10. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
11. The Tribunal has considered the joint electricity bill from June 2013 and the letter from the parties' landlord that states they had been renting his property together since March 2012. The Tribunal has considered the joint statement from the parties that they share rent expenses, electricity and other utility bills and plan expenses as per their monthly budget. The Tribunal has also considered other financial documents including further utility bills and the Foxtel account from 2014. Based on the written evidence before it of the financial aspects of the relationship, the Tribunal is satisfied that the applicant and sponsor pool their financial resources and shared their day-to-day household expenses. The evidence of the financial aspects of the relationship is that the parties were in a genuine and continuing relationship at the time of application.
12. The Tribunal has considered the utility bills and the joint tenancy document provided by the applicant. The Tribunal has also considered the statements made by the parties, in which they record their arrangements of the sponsor moving into the applicant's apartment in 2012. The Tribunal has considered the statement of the applicant dated 7 November 2014 that the applicant is responsible for the daily house cleaning, cooking and washing. In that statement the applicant records the sponsor is working full-time but his household responsibilities are to take the bins out on a weekly basis. The applicant also states that the parties share the shopping, vacuuming and maintenance work. The Tribunal has considered the statement of the sponsor in which he states that the parties live together, the applicant takes care of the house work, and he assists by taking out the rubbish and accompanying her shopping. The Tribunal has considered the consistent written evidence in relation to the sharing of housework and the parties' living arrangements. Based on the evidence of the nature of the household, the Tribunal is satisfied that the applicant and sponsor were in a genuine and continuing relationship at the time of application, and lived together, or not separately and apart, on a permanent basis at the time of application.
13. The Tribunal has considered the photographic evidence of the parties together, the statements of Mr and Mrs Herry, the statement of Mr Choueiri, the letter from the applicant's landlord, the statutory declaration from the sponsor's cousin and the statutory declaration from the applicant's friend, the hand written statements from the applicant and the sponsor and the typed statements from the applicant and sponsor and the joint typed statement from the applicant and sponsor. Based on this evidence before it, that Tribunal is satisfied the parties represent themselves to other people as being a couple and that they undertake social activities together. The evidence of the social aspects of the relationship is evidence that at the time of application the parties were in a genuine and continuing relationship and that the parties had a mutual commitment to a shared life to the exclusion of all others.

14. Based on the statements of the applicant and sponsor the Tribunal accepts that the applicant converted to Islam so that the parties could participate in a religious marriage at the Preston mosque. The Tribunal has considered the statements of the applicant and sponsor in which they state they are committed to sharing a life together and that they view their relationship as a long-term one. The Tribunal has considered the information provided by the applicant, in particular the application form and the statements from the applicant and the sponsor and the letter from the landlord and is satisfied that at the time of application the parties had been in a de facto relationship since 2012. The evidence of the duration of the relationship, and the commitment of the parties to the relationship and to each other is evidence that at the time of application the parties were in a genuine and continuing relationship, and that the parties had a mutual commitment to a shared life to the exclusion of all others.
15. Based on the Mauritian birth certificate of the applicant and the Victorian birth certificate of the sponsor, and the information recorded on those certificates, the Tribunal is satisfied that the parties are not related by family.
16. On the basis of the above the Tribunal satisfied that the requirements of s.5CB(2) are met at the time of application.
17. Therefore the applicant meets cl.820.211(2)(a).

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

18. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
19. Based on the dates of birth recorded in the birth certificates of both the applicant and the sponsor, the Tribunal is satisfied that both the applicant and sponsor were aged over 18 at the time of application.
20. The Tribunal has considered the findings of the delegate in the Department's decision record dated 27 November 2014. The Tribunal has taken a different course to that of the delegate however and finds that there was sufficient documentary evidence provided that immediately before the time of application the de facto relationship between the applicant and sponsor had existed for 12 months. The Tribunal has considered the hand written statements of both the applicant and sponsor who wrote that the sponsor moved in with the applicant in 2012 and later in 2012 they got married in the Islamic mosque. The Tribunal has considered the letter from the landlord who stated the applicant had been living in his rented property since February 2011 and that the sponsor moved in with her in March 2012 and that they still resided at that property at the time of application. The Tribunal has considered the joint electricity bill dated 14 June 2013 for the supply period 8 November 2012 to 12 February 2013. The Tribunal has considered that in the application form the applicant stated that the relationship commenced on 12 March 2012. The Tribunal has considered the three statements dated 7 November 2014. The statement signed by the sponsor alone stated that he met the applicant in March 2010, their relationship developed and he then moved in with the applicant to her apartment in Coburg North and after a few months he asked her to marry him. After the applicant accepted his proposal she converted to Islamic and then they married in the mosque. The statement signed by the applicant alone stated the sponsor

moved into her apartment in May 2012 and after living together for seven months the sponsor proposed to her, then she converted to Islam and they got married in the mosque on 27 November 2012. The joint statement signed by both the applicant and the sponsor states that from May 2012 they were living together in the Coburg North apartment.

21. Whilst the Tribunal acknowledges there is some discrepancy between whether the sponsor moved in with the applicant in March or in May 2012, the Tribunal is satisfied that by May 2012 the sponsor had moved in with the applicant. The Tribunal is therefore satisfied that at the time of application, 5 July 2013, the sponsor had been residing with the applicant for more than 12 months in a de facto relationship.
22. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
23. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

24. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - r.2.03A

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Margie Bourke
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).